91-1278

NO. (1)

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE,

Petitioner,
vs.

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE ELLVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FROM A JUDGMENT FROM THE SUPREME COURT OF FLORIDA

DR. MARK FELDMAN, PRO SE,

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Miami Lakes, Florida 33014
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PETITIONER IN PRO SE

QUESTION PRESENTED

DOES THE 14TH AMENDMENT RIGHT TO DUE PROCESS PERMIT A STATE TO GRANT TORT IMMUNITY TO A HOSPITAL PEER REVIEW PROCEDURE WHEN SUCH PROCEDURE DOES ITSELF VIOLATE RUDIMENTARY DUE PROCESS BY DENYING THE DEFAMED PHYSICIAN THE RIGHT TO BE PRESENT AND HEARD AND DOES DENY AND DEPRIVE HIM OF A VAULABLE PROPERTY RIGHT?

LIST OF PARTIES TO PROCEEDING BELOW

Petitioner, Pro Se certifies that only the following were parties to the proceedings below:

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D., P.A., JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A. MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D., P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., and ORTHOPEDIC ASSOCIATES, P.A.

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QUESTION PRESENTED

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NO._____

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OCTOBER TERM, 1991

DR. MARK FELDMAN, PRO SE

PETITIONER,

VS

STEPHEN GLUCROFT, M.D., STEPHEN GLUCROFT, M.D.,PA.,JOEL DENNIS, M.D., JOEL DENNIS, M.D., P.A., LLOYD MORIBER, M.D., LLOYD MORIBER, M.D., P.A., MELVYN DRUCKER, M.D., MELVYN DRUCKER, M.D., P.A., KENNETH HODOR, M.D., KENNETH HODOR, M.D., P.A., ROBERT S. ENNIS, M.D., ROBERT S. ENNIS, M.D. P.A., HUGH UNGER, M.D., HUGH UNGER, M.D., P.A., AND ORTHOPEDIC ASSOCIATES, P.A.

RESPONDENTS.

PETITIONER, DR. MARK FELDMAN, PRO SE, respectfully prays that a Writ of Certiorari be issued to review the judgment and Opinion of the Supreme Court of Florida filed in this proceeding on Nov. 5, 1991.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process and Access to the Courts provisions of the 14th AMENDMENT of the United States Constitution and the Constitution of Florida, Article I, section 9, the Due Process Clause, and Article I section 21, the Access to the Courts Clause.

PRIOR DECISIONS OF THIS COURT INVOLVED

The most recent decision of this Court effecting this case is SUMMIT HEALTH, LTD. v. PINHAS, 111 S.Ct. 1842(1991). The PINHAS Court held that an individual doctor may bring a Sherman Act claim when fraudulent peer review hearings are used to hide anticompetitive activities by hospital boards and individual staff members.

TRAMMEL V. UNITED STATES 445 U.S.40, protected access to the Courts and COUCH V. UNITED STATES 409 U.S. 322 protected the accused against an inability to use protected evidence necessary to assert a claim.

BØDDIE V. CONNECTICUT, 401 U.S. 371 requires a meaningful opportunity to be heard. As this petition will show, such was not the case in this lawsuit.

OPINIONS AND ORDERS BELOW

APPENDIX A:

ORDER OF SUPREME COURT OF FLORIDA OF 11/5/91 WHICH DENIED PETITIONER'S PETITION FOR CERT.

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JURISDICTION OF THE SUPREME COURT

The Opinion of the Florida Supreme Court was entered on November 5, 1991.

The United States Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). This Petition for Writ of Certiorari is filed within 90 days of the entry of the Opinion of the Florida Supreme Court. See, 28 U.S.C. Section 2101(c).

STATEMENT OF THE CASE

FACTUAL STATEMENT

Petitioner, Dr. Mark Feldman, Pro Se is a Podiatrist. Podiatry is the Medical specialty, whose practitioners are licensed in all 50 States, that treat diseases and deformities of the foot, ankle and leg by

medical and surgical means. Podiatrists are defined as Physicians under the Medicare statute. Podiatrists are analogous to Oral Surgeons, who although not recipients of an M.D. degree, render medical and surgical care and hold the same medical drug prescribing privileges as an M.D. or D.O. (Doctor of Osteopathy). Thus, Oral Surgeons are Dentists who specialize in surgery.

Podiatry Schools are separate and apart from Medical Schools as are Dental Schools. In all Colleges of Podiatric Medicine throughout the United States students are taught by all specalities of medicine including orthopedic surgeons.

Podiatric education requires 4 years premedical education with the same pre-med requirements as any medical school. Another 4 years at a college of Podiatric Medicine and post graduate training of 1-3 years of

surgical residency training in an M.D. or D.O. hospital in the United States. Both as undergraduates and post graduates, podiatrists are taught by orthopedic surgeons.

It is the orthopedic surgeon with whom the podiatrist competes upon graduation from residency training. This medical turf war is vitrolic at best in most hospitals. This is because both specialists treat the foot, ankle and lower leg in mostly the same way. Their patient populations are the same, from infancy through geriatrics. Most hospitals allow the orthopedic surgeon to control the hospital privilege admission availibility, as well as the procedures a podiatrist are permitted to perform once admitted to the staff, if ever. This includes whether or not a podiatrist has access to the hospital emergency room call rotation to obtain new patients. This is the tradi//tional method a new practitioner begins

to build his practice. In most hospitals throughout the United States, orthopedic surgeons are successful in barring podiatrists from both staff privileges and emergency room call rotation.

Petitioner returned to his native south Florida in 1973 and began to apply for surgical privileges at every hospital within a 50 mile radius of his office. It was readily apparant there existed an orthopedic blockade of the hospitals and emrergency rooms.

Parkway General Hospital's (PGH), Board of Trustees in 1975, over the vehement and vitrolic objections of the herein defendant orthopedic surgeons granted plaintiff / petitioner surgical privileges giving as their reason that credentials and training rather than competition were the requirements for privileges. Thus, this prestigious 400 bed institution became one of

the few institutions who would grant petitioner privileges because of the objections of the orthopedic surgeons.

Their economic power over the hospitals due to the admission of thousands of patients per year by the orthopedic staff members was very seldom challanged by any Board of Trustees.

The orthopedic blockade of more than 25 hospitals in the South Florida area led to petitioner filing, pro se, FELDMAN V. JACKSON MEMORIAL HOSPITAL, et al, in 1979. See FELDMAN V. JACKSON MEMORIAL HOSPITAL, 509 F.Supp 518, 571 F. Supp. 1000 (S.D. FLA 1983), aff'd 752 F. 2d 647 (11th Cir. 1985), cert. denied 472 U.S. 1029(1985).

Feldman vs Jackson Memorial had 17 hospitals and almost 100 orthopedic surgeon defendants. The 6 week jury trial, was tried by petitioner, here, pro se, and resulted in a

directed verdict for all defendants, rendered at the close of plaintiff's case.

Dr. Feldman missed the 30 day appeal deadline to the 11th Circuit because of misplacement of the Final Judgment. He Moved the District Judge for an Order under FRCP 66 to allow him to appeal. Judge Kehoe denied the request; it mattered not that the entire docket sheet of the Federal Court Clerk had mysteriously disappeared. Dr. Feldman's subsequent appeal of the denial by the District Court to enter another Final Judgment,(which would have allowed plaintiff to appeal the directed verdict) to the 11th Circuit and the United States Supreme Court fell on deaf ears.

One may be certain that respondents here will not inform this Court, as they have done no other, that the affirmances were only to deny the plaintiff an opportunity to appeal

the District Court decision.

The case now comes to this Court a second time because prior to the 6 week trial, the District Court dismissed all pendant State Claims. In the Federal antitrust case that is reported at 509 F.Supp 815., and at 571 F. Supp. 1000, no State claims are dealt with.

During the discovery proceedings for the Federal antitrust trial, the Federal District Judge ordered Parkway hospital(not a defendant in the Federal Case) and the 17 defendant hospitals to produce all records in Dr. Feldmans file. He learned of the secret activities of defendants/respondents here and filed the suit that is in APPENDIX E.

This complaint by Order of the Florida Supreme Court, reported at FELDMAN V. GLUCROFT 522 So.2d 798 (Fla. 1988) and reproduced as appendix D. The defendants in FELDMAN V. GLUCROFT were for the most part some of the

same defendants as in FELDMAN V. JACKSON MEMORIAL ET.AL.

Thus, this case is one where a Federal Court Orders the State Claims to be severed from the complaint involving a Federal Sherman Antitrust Act claim to be tried in State Court, and the Federal Court having ordered the production of the hidden documents, with testimony adduced in the Federal Antitrust trial, establishing the hearings held without notice to the accused petitioner.

After ordering the State claims to be tried in Fla. Circuit Court, plaintiff runs afoul of the Fla. Statute preventing use of evidence the Federal Judge has ordered produced. These documents are the only method by which Dr. Feldman can clear his name, and prove the State claims a Federal Judge ordered tried in State Court.

In a divided opinion the Fla. Supreme

Court granted absolute immmunity to defendants. No cause of action can be proven without the documents and access to testimony which took place without knowledge of the plaintiff and within the 4 walls of the "Peer Review Room". The Supreme Court's decision makes every hospital committee and its hearing room a nisi prius Court. There can be no appeal, nor trial when all access to evidence is barred, and the accused not invited nor allowed to be any part of any of the proceedings against him.

After remand by the Fla. Supreme Court petitioner filed his Second Amended Complaint. Appendix E. Respondents moved the Florida trial Court for an Order requiring petitioner to post a $ 100,000.00 bond as a condition precedent to moving the case further and to dismiss the new complaint

The Fla. Legislature had, in the interim, passed a Statute that prior to a DOCTOR PLAINTIFF instituting ANY LEGAL ACTION OF ANY KIND AGAINST A HOSPITAL COMMITTEE OR MEMBER OF ANY COMMITTEE, the PLAINTIFF must post a bond sufficient to cover the costs of DEFENDANTS attorneys fees and costs.

The Statutes, Fla. Stat., 395.0115(5)(b) and 768.40(6)(b), were stricken by 3 Florida State Circuits within the last 2 years as being unconstitutional. The statutes are presently before the Florida Supreme Court.

The Florida trial Court ordered petitioner to post a $ 100,000.00 bond prior to proceeding with the case remanded from the

Florida Supreme Court. Petitioner sought a Writ of Cert. alleging facial unconstitutionality of such a one way statute as access to the courts were denied only plaintiffs too poor to post bond, of which petitioner here remains one. The Trial Court was asked to dismiss the Amended Complaint by the Third District Court of Appeals so that the Appeals Court could grant cert. (APPENDIX F) The trial Court refused, allowed discovery, granted summary judgment for defendants. Petitioner appealed. Summary Judgment Affirmed, Appendix C, Motion for Re-hearing Denied, Appendix B. Petitioner here sought Writ of Cert. to Fla. Supreme Court,denied, Appendix A. Cert. now being sought in the highest Court of Our Land.

THE FLORIDA STATUTE IN THIS CASE:

The 1983 version of the statue has been modified by section 768.40, Florida Statues (1985). The 1985 statue embodies many of the same elements as the 1983 version with a few note-worthy changes; specifically, subsection 2) of the 1983 statue has been modified and appears in the 1985 version as section 768.40(3)(a):

There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee, or any health care provider furnishing any information, including information concerning the prescribing of substances listed in s. 893.03(2), to such committee, or any person, including any person acting as a witness, incident

reporter to, or investigator for, a medical review committee, for any act or proceeding undertaken or performed within the scope of the functions of any such committee if the committee member or health care provider acts without intentional fraud.

Section 768.40(3)(a), Florida Statutes (1985) (emphasis added). Additionally, subsection (4) of the 1983 statute was subsequently modified and appears as the following subsection (5):

The investigations, proceedings, and records of a committee as described in the *preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the*

subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented

from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

Section 768.40(5), Florida Statues (1965).

THE DECISION AND ACTIONS BELOW PRESENT AN IMPORTANT CONSTITUTIONAL ISSUE WHICH HAS NOT BEEN AND SHOULD BE DECIDED BY THIS COURT

There is nothing more fundamental or basic than one's constitutional right to access to the courts. See WHAT, IN VIEW OF SUPREME COURT, CONSTITUTES THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS, 52 L.Ed 2d 779. Is not the right clearly illusionary if sections of the Florida Constitution, Art. I, sec. 9, Due Process and Article I, sec. 21, Access to the Courts, gives a prospective litigant these fundamental rights to persue a cause of action on the one hand, and the legislature passes statute which eliminates access to the evidence necessary to prove the allegations.

Such a statute makes redress available by no other means because the only evidence available is undiscoverable and inadmissible by statute. And compounding the harm grants absolute immunity to the individuals the cause

of action was intended to reach.

This court has never decided a case involving the diminution of a doctors surgical privileges, done summiarily without any procedural or substantive due process mandated by the United States and a States Constitution and it's statutes which mandate such process. The closest was the recent Pinhas, supra, decision.

Yet, 22 States have "peer review" immunity statutes that grant absolute immunity to hospital peer review committees and their participants in both public and private hospitals. See A COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS, APPENDIX H.

The statutes forbid discovery of documents used against the accused as well as a prohibition against any inquiry as to what was said within the 4 walls of a hearing room or who was present or said what at trial, or pre-trial. The conspiracy of silence to defame or in any other way injure by any other cause of action is complete as there is no other

method of garnering the evidence to prove an aggrieved doctors case.

In petitioner's case, the assult upon his person and property and liberty interest in his profession is more egregious because in

> DEFENDANTS/RESPONDENTS ANSWER TO THE COMPLAINT. THEY ASSERT TRUTH AS A DEFENSE.

yet hide behind the very Florida statute which prohibits ascertainment of the truth.

And how is it possible to obtain the constitutionally protected fundamental right of access to the court when the very statute triggering the immunity is implanted in a case where procedural and substantive due process procedures are mandated and petitioner received none. Such a statute offends TRAMMEL V. UNITED STATES, 445 U.S. 40.

" We hold that when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." COUCH V.

UNITED STATES 409 U.S. 322. MEMORIAL HOSPITAL FOR MCHENRY COUNTY V. SHADUR, 664 F.2D 1058 (7TH CIR. 1981), medical review privilege not recognized in an antitrust action.

This case began as a federal antitrust action with the state claims assigned to state court. No statutory privilege should apply. COUCH, supra.

How far betond the setting of crime and punishment the Constitution requires "States to shoulder affirmative obligations to assure...meaningful access to the courts", BOUNDS V SMITH 430 U.S. 817, AT 824, has been a much debated question. If the pronouncement in LOGAN V. ZIMMERMAN BRUSH, 455 U.S. 422, 430N.5 (1982) is to have any meaning, this Court should resolve the issue presented by this petition.

As BODDIE V. CONNECTICUT, 401 U.S. 371, AT 377 ASSERTS, "Where the State's requirements work to deny any meaningful opportunity to be heard," however, due process has been denied. Does not a doctor

once granted a privilege in a hospital who has the privilege stripped away by other doctors without any procedural safeguards mandated by statute and hospital bylaws fit such a deprivation when a State Statute bars access TO THE ONLY EVIDENCE AVAILABLE TO HIM ?

The Florida law allows a committee member to be deposed only to the extent of matters within his own knowledge that took place outside a committee rooms. The futility of such an undertaking is amply recorded in the deposition taken for trial of Dr. Robert Raskin. APPENDIX I.

Petitioner had never known or met Dr. Raskin. Prior to going to Michigan from Miami. petitioner spoke with the Dr. to ascertain what matters within Dr. Raskin's own knowledge would Dr. Raskin be able to testify about.

Dr. Raskin asserted to petitioner that the true motivation behind respondents actions was because petitioner was an economic threat to the respondents. Furthermore. the letters written on Dr. Raskin's stationery were

composed and written by defendants. Further, the inquiry into the procedure was totally controlled by defendants and that when Dr. Raskin told the defendants to talk to me about the procedure the defendants asserted to him that they had done so when in fact they had not. As this Court can see, any and all questions were blocked by the privilege being asserted. The conspiracy of silence remained. Petitioner was and is barred from the only available evidence to prove his case.

The narrow avenue of entry to the courts afforded by the illusion that someone will come forward to break the code of silence among committee members is just that. This Court has not allowed such State statutes to stand. PICKETT V. BROWN, 462 U.S. 1 (1983).

"Nothing opens the door to arbitrary action so effectively as to allow...officials to pick and choose only a few to whom they will apply legislation and thus to escape the

political retribution that might be visited upon them if larger numbers were affected." RAILWAY EXPRESS AGENCY ,INC. V. NEW YORK, 366 U.S. 106 (1949) AT 116.

If it is true that Dr. Feldman had a Fundamental Right; the liberty and property interest in the surgical privileges which were granted to him by the Parkway hospital board of trustees: and if it is true that such rights cannot be arbitarily and capriciously taken away because of intentional elimination of procedural and substantive due process mandated by both state statute and the hospital bylaws: and if it is true that such a fundamental right is controlled by the Fla. State judicial system monopoly, then it must be true that access to the only medthod of evidence available to vindicate any transgression of the right must not be allowed to stand. Anything less than such strict judicial scrunity leaves the doctots so put upon with a "STATES onerous evidentiary rule that the rule deprives ..(Dr. Feldman) of a

meaningful opportunity to be heard". LITTLE V. STREATER 452 U.S.1 (1981)

As the three Justices said in their dissent in FELDMAN, 522 So.2d at 802:

> "I dissent for the reasons set forth in my dissent to HOLLY V. AULD, 450 So.2d 217 (FLA. 1984). Despite the protests to the contrary, it is obvious that the majority decisions here and in HOLLY create an absolute bar to defamation actions based on proceedings before medical review committees and thus conflict with article I, section 21, of the Florida Constitution. Both certified questions should be answered in the affirmative. "

Petitioner asserts that this Court should grant Cert. and find the statutes are unconstitutional.

This petition presents the questions of whether a State Statute which immunizes peer review participants and prohibits any discovery into the peer review proceedings or documents within the review proceedings violates the the Due Process and Access to the Courts sections of both the State of Florida and the United States Constitutions.

In PINHAS, it was proven that the "peer review" hearings that were held were fraudulent. Petitioner here presents a situation in which "peer review" hearings were held and the Petitioner found guilty WITHOUT ANY NOTICE HAVING BEEN GIVEN TO PETITIONER DESPITE BOTH FLORIDA STATUTES AND THE HOSPITAL BYLAWS REQUIRING NOTICE AND AN OPPORTUNITY TO BE HEARD AND TO PRESENT EVIDENCE IN HIS BEHALF.

The proceedings and adjudication of guilt by the orthopedic surgeon defendants

resulted in a dimunition of his surgical privileges at the hospital where he had them, as in PINHAS, and an inability to obtain hospital privileges at multiple institutions petitioner had applied to. This occurred because the results of the fraudulent peer review were disseminated throughout multiple hospitals by defendants, respondents.

As this Court said in MULLANE V. CENTRAL HANOVER BANK & TRUST CO.,, 339 U.S.306, 314(1950).

" An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"

In the case before this court it is uncontroverted that the petitioner received no notice of any hearing nor any opportunity to participate in the peer review process. The defendants defamed him by their declaration and dissemination to other doctors, non-physician committee members, other hospitals and their corporate ownerships throughout the United States, that the plaintiff performed experimental surgery on a child.

It is uncontroverted that the Parkway Hospital by-laws required a hearing process.(APPENDIX E, P.48). It is uncontroverted that the defendants respondents eliminated petitioners privileges to perform the procedure that he did; and that he had privileges to perform the procedure, granted to him by the Board of Trustees of Parkway hospital.

After defendants removed plaintiffs privilege to perform the procedure without a hearing, they instituted a bylaw provision that the defendants, would be the only

surgeons allowed to do the procedure. Tthus, if in fact the procedure was experimental, which it was not, see Schoenhaus deposition, APPENDIX G. , the defendants actions allowed the defendants to perform experimental surgery on children.

A fair hearing before an unbiased tribunal is essential to due process. DUFFIELD v. CHARLESTON AREA MEDICAL CENTER, 503 F.2d 512, 517 (4thCir. 1974).In our context this means that a physician is "entitled to have his case judged by fair minded doctors who... (are) able and willing to ...decide the case with 'good faith objectivity.'" KLINGE V. LUTHERAN CHARITIES ASS'N, 523 F.2d 56, 63 (8th Cir. 1975).

Once the state has made access to the court an entitlement or necessity the state may not deprive someone of that access unless the balance of state and private interests favors the government scheme. *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422, 102, S.CT. 1148 (1982).

Justice Jackson writing for the court in *MULLANE v. CENTRAL HANOVER BANK & TRUST, CO.*, 399 U.UF.S. 306, 70 S.CT. 652 (1950) *"Many contravercies have raged about the cryptic abstract words of the due process clause but there can be no doubt that at minimum they require the depravation of life liberty of property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."*

The conclusion is hardly a novel one, the Logan Court continues. The court traditionally has held that the Due Process Clause protects civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.

It is abundantly clear that the Florida Constitution Article I Section 21 creates a fundamental right of access to the courts, yet the statutes here in question preventing the discovery and use of any and all material necessary to prove his case serves as a total blockade to that access to the court, that fundamental right is therefore eliminated.

Certainly Dr. Feldman had a property right to the privileges that were granted to him by the Parkway Hospital Board Of Trustees. ***SHAHAWY v HARRISON***, 778 F.2d. 636 (11 THCIR.1985). Dr. Shahawy did not have cardiac catherization privileges. Dr. Feldman had privileges to do the procedure that he did, see Shahawy at Page 644. Dr. Feldman does have a liberty and property interest in the privileges granted to him that were summarily eliminated by the orthopedic surgeon defendant.

IT IS NOTED HERE THAT DR. FELDMAN DID NOT SUE PARKWAY REGIONAL MEDICAL CENTER. This is quite simply because the allegations in the complaint show full well that the hospital was acting only on the basis of the fraudulent

representations by the defendants and Dr. Feldman did not think then, nor does he now, that the hospital should be liable for action of individual defendants that lie to hospital committees where other committee members are nothing more than dupes because of the fraudulent allegations and actions of the defendant orthopedic surgeons.

As Shanawy, at Page 643 points out: *"where termination of staff privileges has successfully invoked due process protection the predicate has been the assistance of an implied contract, or the assistance of such severe injury to the plaintiff that he would be unable to practice in that area. Northeast Georgia RADIOLOGICAL ASSOCIATES v. TIDWELL, 670 F2d 507,510-11 (Fifth Circuit Unit B*

1982)". It is undisputed that the termination of Dr. Feldman's privilege at Fairway to perform the procedure he had privileges to do, was disseminated throughout the hospitals in the South Florida area and that it was the reason he was unable to obtain hospital surgical privileges at any other area hospitals. See in particular letter of Charles Weiss, MD., Chief of Orthopedic Surgeons Mount Sanai Hospitals in the Plaintiffs Complaint Appendix A.

From Logan, at Page 275, 71L.ED.2d 265, at 275,(4) *"Each of our due process cases has recognized, either explicitly or implicitly that because minimum procedural requirements are a matter of federal law they are not diminished by the fact that tne state may have*

specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." "Any other conclusion would allow the state to destroy at will virtually any state created property interest. The Court has considered and rejected such an approach: while the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred without appropriate procedural safe guards. The adequacy of statutory procedures for depravation for a statutorily created property interest must be analyzed in constitutional terms.", VITEK v. JONES, 445 U.S. 480-491, n.6. The deprivation in Dr. Feldmans

case is quite simply the elimination of the availability of all evidence to prove not only a deformation claim but any cause of action that the defendants are clever enough to hide within the four walls of the so-called hearing room.

As Logan goes on to say at Page 276 IC,(b) *"As our decisions have emphasized time and again the due process clause grants the agreed party the opportunity to present his case and have its merits fairly judged. It has become a truism that some form of hearing is required, before the owner is finally deprived of a protective property interest."* To put it as plainly as possible, the state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of

entitlement. It would seem a maxiom therefore, that the State cannot on one hand grant the Plaintiff such as Dr. Feldman the right of access to the courts, to the courts, and on the other, withhold from the Doctor any and all evidence needed to support his claim.

A central question in the Plaintiff's case here is that on what basis was the immunity statue triggered when Dr. Feldman was afforded no procedural or substinative due process as the hospital bylaws and state statue require prior to the implementation of immunity. That is to say immunity is predicated on an individual having both substantive and procedural due process. It is undisputed that Dr. Feldman had neither. Neither the Supreme Court nor

the courts below would answer this question. Does, "a meaningful opportunity to be heard, firmly imbedded in our due process jurisprudence", 401 U.S. 577, Dr. Feldman was eliminated from the outset. *BODDIE v. CONNECTICUT*, 401 U.S. 371.

The **PINHAS**, Court, supra, has applied the discovery privileges in antitrust cases through a long line of hospital and doctor grievance cases. The PINHAS decent suggest that the antitrust laws are not the correct Forum, but state tort laws govern and would have doctors grievances confined to state court tort law systems. Eliminating the availability of evidence that state courts require for civil litigants to proceed clearly eliminates the cause of action before any

complaint is filed. This denial of the constitutional right to access to the courts cannot be eliminated by a states eliminating access to the evidence necessary to prove ones case. See annotation quotes, **WHAT, IN VIEW OF SUPREME COURT, CONSTITUTES THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS.** 52 L.LEd.2d779. Such evidentiary barriers were eliminated by this United States Supreme Court in ***HERBERT v. LANDO***, 441U.S.153 decided in 1979. As the Lando Court said, at Page 171 *"spreading false information in and of itself caries no first amendment credentials. There is no constitutional value in false statements of fact"* ***GERTZ v. ROBERT WELCH*** at 340, it is clear that Evidentiary privileges in litigation are not favored. ***ELKINS v.***

UNITED STATES, 364 U.S. 206, 234 (1960) as the court went on to say the President for example does not have an absolute privilege against disclosure material subpoenaed for a judicial proceeding. ***UNITED STATES v. NIXON***, 418 U.S. 683 (1974) As the Nixon Court stated at 710 *"whatever their origins these exemption to the demand for every mans evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth."*

STATUTORY PEER REVIEW IMMUNITY LAWS IN THE UNITED STATES

State peer review immunity laws are in Appendix H, attached to this brief. It was prepared in 1988 by the Medical American Association.

Non-discoverability and confidentiality. The states of Alaska, Arkansas, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Road Island, South Carolina, Tennessee, Vermont, West Virginia, and Wisconsin prohibit the utilization of records of peer review committees making them confidential and non discoverable. These twenty-two states have enacted statues that say that the proceedings and records

of peer review committees typically are confidential and non discoverable.

An exception that is present in the peer review non-discoverability laws of a number of states permits a physician to obtain access to peer review materials when challenging the criterion, suspension, termination or denial of staff privileges. The states containing this exception are, Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, Oregon, Road Island, South Dakota and Washington. These seventeen states permit Doctors injured as Dr. Feldman was access to the records contained in such peer review proceedings when the records of such peer review committees and

proceedings are necessary to prove the allegations in the complaint and it may be done by no other means.

The Court should accept jurisdiction and grant certiorari to resolve the extraordinary dichotomy between the access to evidence among the disparate statues which exists in the states identified above.

As an example of how far the State of Florida has gone to immunize absolutely the participants in the peer review process, the Florida Statue which mandated that prior to filing a civil action against a hospital or members of a peer review committee **PLAINTIFF** must post a bond sufficient to cover the cost of the Defendants attorneys fees and cost must be posted prior to the institution

of such a civil action. The bond requirement provision has been stricken as unconstitutional by three Circuit District Courts Of Appeal In Florida. The issue is currently before the Florida Supreme Court. After the Supreme Court mandate allowed the Plaintiff Dr. Feldman to amend his complaint the statutory bond provision was applied to the Plaintiff and a $100,000 bond order was entered by the trial court. Dr. Feldman appealed the bond provision as being attached to his amended complaint and the issue was never ruled upon by the District Court Of Appeals Of Florida or the Florida Supreme Court.

It is readily apparent that the thousands of doctors practicing in twenty-two States who are set upon by

their competitors, enemies, or tortfeasors in a hospital setting will remain powerless, as they are today, to defend themselves. The nondiscoverability statues grant absolute immunity to any accusers throughout any of twenty peer review committees in a hospital composed of both physicians and non-physicians. This Court should intervene to settle the question of the Constitutionality of these statues when they prohibit access to the courts. Is it possible that the United States Supreme Court will allow these malignant statutes preventing discovery of evidence necessary to prove a Doctors innocence to remain untreated and further metastasize throughout the United States? Petitioner implores this court to grant his

requested Writ of Certiorari tend to decide the issue for this Nation.

THE STATUTE OF LIMITATIONS ISSUE

Defendants below raised the issued of statute limitations as a defense. The statute limitations is governed by ***CASTER v. SAINT MARY'S HOSPITAL***, 835 F.2d 289, (1987). It is not disputed that the plaintiff, petitioner, had no notice of any of the proceedings that destroyed his surgical career. Their accusations were secret, their deliberations were secret; their removal of the privileges of the plaintiff were secret; their dissemination of their actions at Parkway and disseminated to subsequent hospitals namely North Miami General and Mount Sanai Hospital to name but a few were secret. It was only after the discovery of the fraudulent concealment

that plaintiff became aware and he promptly sued them. As in **CASTER**, supra, and the cases cited therein fraudulent concealment tolls the statue of limitations.

THE DEFENDANTS ACTIVITIES UNDER STATE LAW

It has been stated the plaintiff did not sue the hospital because the defendants activities as alleged in the complaint were outside the provisions of the bylaws and when directed to perform in accordance with the bylaws. When defendants continued activities outside the bylaws and their fraudulent representations to the committees that they had acted within in the hospital bylaws may serve to assert by defendants that they acted under color of state law.

Thus the defendants were, according to them, (1) So directed and constrained by state law, Florida Law 768.40(4),FLA.STAT. Florida Law required the defendants to operate through a

committee under bylaws proscribed by the Hospital. (2) That this committee and those that they appeared before in multiple hospitals had the power to make decisions affecting the plaintiffs property, livelihood, and the liberty interest in his reputation.

(3) That because the state law gave the defendants the power to deprive the plaintiff of his property his livelihood and his liberty interest in his reputation, it clothed them with the color of state law and required them to give due process to the plaintiff including notice of the charges against him and the opportunity to be heard.

The defendants thus have asserted the operation of Florida Law 768.40(4)(1977), as construed by the

Florida Courts, totally deprives the plaintiff of his property livelihood and liberty interest in his reputation by cutting off all access to evidence that proves the due process violations.

The clear facts are that defendants activities took place outside the statutes if the allegations in the complaint are, and they must be accepted as true. The immunity protection proscribed by the statue should not apply to these defendants. The evidence should be therefore discoverable. If not, then by defendant assertions they were acting under coloration of State Law and a Section 1983 case should be established.

Unlike the Pinnas Case, petitioner here has alleged that conspirators has perverted the peer review process in hospitals throughout the city. The peer review process at Parkway led to being the gateway to other hospitals in the South Florida market, in the sense being the only way *"or even one of the few ways"* to gain entry., See Pinhas at Section II. (2).

Had petitioner here been afforded ten percent of the procedural protection accorded the Doctor in ***HAYDEN v. BROACY***, 744 F.2d,@ 1343 this petition would not be before this court. From the beginning of the Broacy case at Page 1338 to its very end this court can see in great detail the procedural and substantive due

process protection the doctor received. We deal not with even a modicum of such protection afforded to Doctor Feldman. Indeed the opposite is true. He was kept in the dark by the defendants and they did so deliberately. The witch hunt and subsequent burning destroyed the plaintiffs life and this court should allow the petitioner here to prove it. These defendants should not be able to hide behind a misapplied unconstitutional statutes to protect them from their heinous activities in the wanton and wilful destruction of a competent doctors life solely because the orthopedic defendants hated him.

It simply offends due process to countenance a law which confers as a valuable legal right but then permits that right to be capriciously swept away on the wings of luck and happenstance. If the only way a doctor can prove the allegations in a complaint is contained between the four walls of a committee room so well hidden by the defendants that only testimony of the committee members and its witnesses before it, one of whom does not and was not the accused, the valuable legal right of access to the courts is clearly capriciously swept away on the wings of luck and happenstance. This Court has not allowed such infirmities in the judicial system to occur.

Vital to the concept of procedural due process is the notion that a valuable property interest, such as those conferred by state law, (access to the courts) must not be "arbitrarily undermined." *BOARD OF REGENTS v. ROTH*, 408 U.S.564.(1972)

CONCLUSION

For the reasons herein expressed, petitioner prays this Court will grant the Writ of Certiorari to decide a question never decided by this Court. As has been stated, the issue affects the doctors in 22 States which have statutes prohibiting evidentary discovery in medical and hospital peer review procedures.

Petitioner has no way of knowing or assessing what elements are the dispositive reasons for granting the Writ. Clearly the lives of thousands of good doctors who are denied the opportunity to be heard when accused of misconduct in a hospital setting may be one of them, it may not.

This case exhibits an exhaustive dedication to the search for the truth. Except for a single year from 1983-1984 petitioner has had no formal legal training. He quite simply walked into a law library in 1974, asked the head librarian to teach him how to use a law library, and he has been there ever

since. Being a self taught incipient lawyer for the past 18 years is not how he planned to spend his career after 12 years of pre and medical education. Make no mistake, without procedural direction from supportive barristers the legal achievements, if any, would have never been.

As a 34 year old doctor forbidden to practice his specialty because of hatred from surgical specialists whose bretheren had taught him in the first place, the law was clearly his only avenue of persuit and the courtroom his only forum. There was then as now no ability to retain counsel.

In suitable irony, the Board at the only Miami Medical School University Affiliated Hospital mandated that he be allowed to teach in the Orthopedic Surgical Residency program, over the vitriolic objections of the orthopedic surgical staff. He could teach, which he did from 1975-77, but was not permitted to use the hospital for his own patients to earn a living.

Persuit of the legal issues as a pro se litigant from 1975-1992 has resulted in multiple victories and failures. The victories have seen other doctors, podiatrists as well as non-podiatrists gain full access to the hospital operating rooms and emergency room call rosters in Florida and elsewhere. The failures consigned him as an annuity for the trial and appellate Bar while he seeks to clear his name and see the Court's open to similiarily treated doctors in all specalities of medicine around the United States.

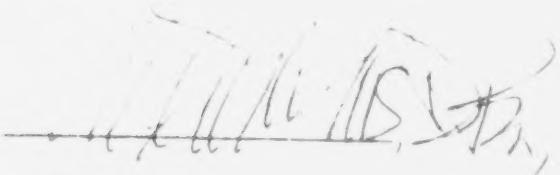
Dr. Feldman's name has endured the disgrace caused by the actions of defendants since 1975, and it continues to this day. No matter that his life has been destroyed by the events culminating from the actions of the defendants. The price paid by petitioner is the destruction of everything he ever expected to hold dear. No doubt that Writs are not granted on such facts.

It remains the exhaustive effort to see the truth asserted within the 4 walls of a

courtroom that brings another pro se litigant to this Court's door. If the inscriptions in the marble that encase this Court mean anything at all, this Court's doors will be open to Petitioner and he will have the meaningful opportunity to be heard he has been seeking.

Dated Jan. 31, 1992

Respectfully submitted,



Dr. Mark Feldman. Pro Se
TTOCSROF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THIS PETITION FOR A WRIT OF CERTIORARI WAS SENT THIS FEB. 3, 1992 TO:

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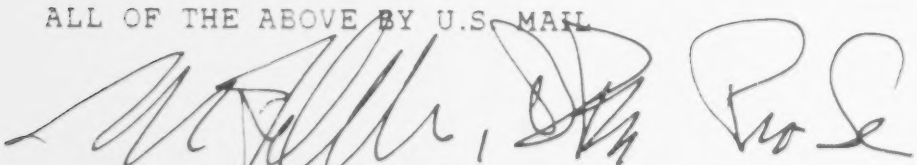
THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, TALLAHASSEE, FLORIDA.

ALL OF THE ABOVE BY U.S. MAIL



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